

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION**

UNITED STATES ex rel.	§	
	§	
HEATHCOTE HOLDINGS CORP., INC.,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Civil Action No. 2:08-cv-00349-TJW
	§	
CHURCH & DWIGHT CO., INC.,	§	
	§	
Defendant.	§	

UNOPPOSED MOTION TO STAY PROCEEDINGS

Defendant Church & Dwight Company (“Church & Dwight”) respectfully moves to stay the proceedings in this case. As explained in more detail below, Church & Dwight respectfully requests that this Court stay this case at least until Judge Brinkema of the Eastern District of Virginia decides a pending motion to dismiss in *Pequignot v. Solo Cup Co.*, No. 1:07-cv-897 (E.D. Va.),¹ in view of the constitutional and jurisdictional issues raised in that case. Church & Dwight also requests that this Court hold in abeyance the deadline to answer, move or otherwise respond to the amended complaint until ten (10) days after this Court lifts the stay.

Counsel for Relator Heathcote Holdings Corporation (“Heathcote”) has stated that Heathcote will not oppose Church & Dwight’s request for a stay that runs until Judge Brinkema issues her ruling in the *Solo Cup* case, and it will not oppose a 10-day extension thereafter.

For the Court’s convenience, a proposed Order granting the relief requested by this unopposed motion is attached hereto.

¹ This is the same stay of proceedings recently ordered by this Court in *Pequignot v. The Gillette Company and The Procter & Gamble Company*, No. 2:08-CV-222-TJW (E.D. Tex.).

I. BRIEF BACKGROUND

This is a case alleging false patent marking under 35 U.S.C. § 292. Recently, the constitutionality of Section 292 and related jurisdictional issues have been challenged by motions to dismiss filed by defendants in the following cases: 1) *Pequignot v. Solo Cup Company*, No. 1:07-cv-897 (E.D. Va.); 2) *Harrington v. CIBA Vision Corp.*, No. 3:08-cv-251 (W.D.N.C.); and 3) *North Carolina Farmers' Assistance Fund, Inc. v. Monsanto Co., et. al.*, No. 1:08-cv-409 (M.D.N.C.). The plaintiffs in these cases have opposed the defendants' motions to dismiss. For the Court's convenience, attached as Exhibits A-C are the current docket reports for each of the cases mentioned above.

In the *Pequignot v. Solo Cup* case, Judge Leonie Brinkema of the United States District Court, Eastern District of Virginia ordered the United States to set forth its position regarding the standing issues because Solo Cup's motion to dismiss called into question the constitutionality of Section 292. The United States filed a Notice of Intervention on November 7, 2008 indicating that it would intervene in the *Pequignot v. Solo Cup* case to defend the constitutionality of the statute. Judge Brinkema has set the following briefing schedule regarding the United States' Notice of Intervention: (1) the United States' brief is due by December 10, 2008; (2) responsive briefs are due January 9, 2009; (3) any reply brief is due January 16, 2009; and (4) the parties are to notice a hearing for a Friday in January 2009.

The United States also filed Notices of Intervention in the *North Carolina Farmers' Assistance Fund v. Monsanto* and *Harrington v. CIBA Vision* cases. The court in the *Monsanto* case has set a briefing schedule in which any reply briefs are due by January 29, 2009, and the court in the *CIBA Vision* case has set a briefing schedule in which any reply briefs are due by February 6, 2009.

II. THIS CASE SHOULD BE STAYED

Heathcote filed its original complaint against Church & Dwight on September 12, 2008, followed by an amended complaint on October 3, 2008. The current deadline for Church & Dwight to answer, move, or otherwise plead in response to the amended complaint has been extended to December 10, 2008.

In view of the constitutional and jurisdictional issues raised by the motions to dismiss in the *Solo Cup*, *CIBA Vision*, and *Monsanto* cases, and in view of the United States' intervention (and resulting briefing schedules), Church & Dwight's counsel contacted Heathcote's counsel to discuss a stay of this case. Church & Dwight proposed a stay of the case until the conclusion of any appeals of the decisions on the respective motions to dismiss in the *Solo Cup*, *CIBA Vision*, and *Monsanto* cases. Counsel indicated that Heathcote would not oppose Church & Dwight's request to stay the case until Judge Brinkema issues a ruling on Solo Cup's motion to dismiss (consistent with the same stay of proceedings recently ordered by this Court in *Pequignot v. The Gillette Company and The Procter & Gamble Company*, No. 2:08-CV-222-TJW (E.D. Tex.)), but would not agree to a stay through any immediate appeal of the decisions on the motions to dismiss in the *Solo Cup*, *CIBA Vision*, and *Monsanto* cases.

It is Church & Dwight's view that the same constitutional and jurisdictional issues that have been raised in the *Solo Cup*, *CIBA Vision*, and *Monsanto* cases are present in this case, and how the Federal Circuit ultimately decides those issues will bear directly on this case. Indeed, any decision by the Federal Circuit will be binding precedent for this Court and the other courts in which false marking cases are pending.

Accordingly, Church & Dwight believes that this case should be stayed until completion of any Federal Circuit appeal from the decisions in the *Solo Cup*, *CIBA Vision*, and *Monsanto*

cases, whether appeals from dismissals of the cases, or interlocutory appeals from denial of the motions in those cases.

In the interest of conserving this Court's and parties' resources, however, Church & Dwight respectfully requests, at this time, that this Court stay this case until Judge Brinkema issues her ruling in the *Solo Cup* case. Church & Dwight also respectfully requests that this Court hold in abeyance the deadline for Church & Dwight to answer, move or otherwise respond to the amended complaint until 10 days after this Court lifts the stay. Counsel for Heathcote has stated that Heathcote will not oppose Church & Dwight's request for a stay that runs until Judge Brinkema issues her ruling in the *Solo Cup* case, and it will not oppose a 10-day extension thereafter.

Should this Court grant Church & Dwight's request to stay the proceedings, and should any party take an immediate appeal in the *Solo Cup*, *CIBA Vision*, and *Monsanto* cases, Church & Dwight reserves the right to ask this Court to extend the stay until the completion of any such appeals in the *Solo Cup*, *CIBA Vision*, and *Monsanto* cases.

REQUEST FOR RELIEF

WHEREFORE, for the foregoing reasons, Church & Dwight respectfully requests that this Court: (1) stay this case at least until Judge Brinkema issues her ruling in the *Solo Cup* case; and (2) hold in abeyance the deadline for Church & Dwight to answer, move or otherwise respond to the amended complaint until ten (10) days after this Court lifts the stay.

Dated: December 4, 2008

Respectfully submitted,

/s/ Jennifer P. Ainsworth

Jennifer P. Ainsworth

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ATTORNEYS FOR DEFENDANT

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was filed electronically in compliance with Local Rule CV-5(a). As such, this motion was served on all counsel who have consented to electronic service, Local Rule CV-5(a)(3)(A), on December 4, 2008.

/s/ Jennifer P. Ainsworth

Jennifer P. Ainsworth

CERTIFICATE OF CONFERENCE

The undersigned counsel hereby certifies that counsel for Church & Dwight and counsel for Heathcote conferred via telephone and e-mail conference, and Heathcote stated it will not oppose Church & Dwight's request for stay that runs until Judge Brinkema's ruling in Solo Cup, and it will not oppose a 10-day extension thereafter.

/s/ Jeremy P. Oczek (with permission, JPA)

Jeremy P. Oczek